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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1965

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DR. ANDREW C. IVY,

*Petitioner,*

vs.

NICHOLAS KATZENBACH, Attorney General of the United States, and EDWARD V. HANRAHAN, United States Attorney for the Northern District of Illinois,

*Respondents.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioner, Dr. Andrew C. Ivy, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above-entitled case on September 22, 1965.

## OPINIONS BELOW

The memorandum opinion and final judgment order of the district court is unreported, and will probably be reported in ..... F. Supp. ....., but is printed in Appendix A, pages 41-50, submitted herewith.[1] The opinion of the

[1] Appendix A is the same as the one filed in the Court below.

Court of Appeals, printed in appendix B hereto, *infra*, pages 1-5, is unreported, but will be reported in ..... F. 2d .....

## JURISDICTION

The judgment of the Court of Appeals was entered on September 22, 1965 (App. D, p. 7, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

## QUESTIONS PRESENTED

1. Whether the petitioner, the peer of all physiologists and pharmacologists, in the protection of his rights under the First and Fifth Amendments to the Constitution of the United States and in the public welfare, is entitled to an injunction enjoining the respondents, pending a decision by the court of equity regarding the efficacy of the drug Krebiozen in cancer treatment, from prosecuting the petitioner in a criminal case where the complaint in equity was filed subsequent to the return of the indictment but about six (6) weeks before trial; where the United States Secretary of Health, Education and Welfare arbitrarily abused and exceeded his official powers and prerogatives in violation of petitioner's rights under said First and Fifth Amendments by denouncing and defaming the petitioner, without prior official warning or hearing, as a cancer fraud and Krebiozen as a cancer fake, to the public generally, to petitioner's patients, and to physicians engaged in prescribing and researching Krebiozen under the correlation of petitioner with the threat of reprisal by medical associations or by said Secretary if they continue to use Krebiozen; where the said Secretary made such accusations without any scientifically acceptable basis therefor (neither the said Secretary nor any governmental agency ever having clinically tested[2] said drug—the only scientifically acceptable basis for proving the efficacy of

any drug — whereas petitioner and 1,000 physicians by clinically testing on 4,000 patients found the drug to be safe and to have favorable biological effects in increasing longevity and alleviating pain); where the foregoing acts of said Secretary have devastated petitioner's reputation, his proprietary rights to practice medicine, engage in research, and to lecture and teach; where said indictment was motivated by the respondents as attorneys for said Secretary in furtherance of his aforesaid unconstitutional acts, and where respondents are compounding said Secretary's aforesaid unconstitutional acts by prosecuting petitioner under the indictment, the crux of which indictment repeats the same defamation that the petitioner is a cancer fraud and Krebiozen a cancer fake; where the petitioner is threatened with a multiplicity of further criminal and civil actions by respondents based upon the same unconstitutional defamations; where all of the foregoing has resulted, and will continue to result, in great, immediate, irreparable injury to the petitioner, and in even greater harm to the public by preventing hundreds of thousands of present and potential cancer victims from using the drug and having the benefits thereof; and where petitioner cannot adequately vindicate his aforesaid constitutional rights in the pending criminal case, regardless of its outcome, because of the threat of further and continuous defamations, prosecutions and harassments of petitioner by respondents in furtherance of said Secretary's unconstitutional acts, as aforesaid?

2. Whether, under the circumstances related in the preceding question, the Secretary's refusal to clinically test Krebiozen,[2] admittedly knowing that a clinical test is the only scientific method of determining the efficacy of any

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[2] A clinical test means injecting the drug in cancer patients and observing the medical results.

drug, manifests his lack of good faith in defaming petitioner and his professional career, in violation of the First and Fifth Amendments, so as to impregnate the indictment, which repeats the defamation, with the Secretary's same lack of good faith and unconstitutional acts and takes respondents' prosecution outside of the scope of legitimate, permitted criminal proceedings brought lawfully and in good faith, thereby divesting respondents of their customary sovereign immunity, and making them, as the attorneys and agents of the Secretary, subject to restraint by a court of equity to remove the immediate peril of prosecution instigated by the Secretary?

3. Whether, under the circumstances related in the first question, the respondents lose their discretion to prosecute petitioner when the undenied allegations of the complaint in equity charge the respondents with an intent to bring a multiplicity of criminal and civil actions against petitioner, in addition to the pending criminal action, based upon the Secretary's abuse of power in branding petitioner and his professional pursuits a cancer fraud without justification in violation of petitioner's First and Fifth Amendment rights; and where said complaint does not challenge the constitutional validity of any statute the indictment charges the petitioner with violating?

4. Whether a verdict by the jury in a federal criminal case would be pure conjecture concerning the efficacy or non-efficacy of Krebiozen, as compared to the certainty of a clinical test[3] conducted by a commission of physicians under the supervision of a court of equity, as to constitute a violation of the accused's rights to due process and a fair trial under the Fifth and Sixth Amendments to the Constitution of the United States where the central theme of

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[3] A clinical test means injecting the drug in cancer patients and observing the medical results.

the indictment is that Krebiozen is a fake cancer drug; where respondents admit under the pleadings in the equity suit seeking such clinical test that as a matter of scientific fact the efficacy of this or any other drug can be decided only by a clinical test; and where respondents further admit that such a test cannot be conducted before a jury inasmuch as it would be beyond the jury's comprehension and ability to intelligently observe and decide the results thereof, and that it would be beyond the inherent powers of the criminal court to conduct such test?

5. Whether, under the circumstances related in the preceding question, a federal court of equity, in a suit filed after the indictment but about six (6) weeks before the commencement of the criminal trial, will enjoin the prosecution of the accused, under an indictment labeling Krebiozen as a "cancer fake" and the accused a "cancer fraud", until the completion of a clinical test by a commission of physicians under the supervision of said court of equity, inasmuch as the accused cannot adequately defend himself in the criminal case, and cannot vindicate his rights to due process and a fair trial under the Fifth and Sixth Amendments to the Constitution of the United States without such a clinical test, which would prove with scientific certainty, as distinguished from the conjecture of expert testimony, that Krebiozen is efficacious as an anti-cancer drug and that petitioner is not a "cancer fraud", especially where this basic issue in the criminal case is of grave public concern and importance, and the purely conjectural verdict of the jury could adversely affect the public interest?

## CONSTITUTIONAL PROVISIONS INVOLVED

The First, Fifth and Sixth Amendments to the Constitution of the United States (pertinent text thereof set forth in Appendix C, p. 6, *infra*).

## STATEMENT

The complaint in this equity action was filed in the United States District Court for the Northern District of Illinois, Eastern Division, on March 10, 1965 (App. A, p. 3); and jurisdiction of the court was invoked under the provisions of Section 1331 of the Judicial Code (28 U.S.C. 1331), in that the matter in controversy exceeds the sum of Ten Thousand Dollars, exclusive of interest and costs, and arises under the Constitution and laws of the United States (App. A, pp. 3, 13).

The action seeks: (1) To enjoin the respondents from prosecuting the petitioner in a federal criminal case pending in the same judicial district and division (App. A, p. 4), based on petitioner's Constitutional rights being violated under the First and Fifth Amendments (App. A, pp. 3, 12-16, 18) by the United States Secretary of Health, Education and Welfare without scientific basis (App. A, pp. 12, 13, 14) having denounced an anti-cancer drug known as Krebiozen as a "cancer fake" and petitioner a "cancer quack" (App. A, pp. 11, 12, 14, 16), and such misconduct by the Secretary being imputed to his attorneys, the respondents, by reason of the same accusations and defamations made by the Secretary against the petitioner being used by the respondents to obtain, and which are the crux of, the indictment (App. A, pp. 10, 11); together with the fact, that the respondents threaten the petitioner with future similar prosecutions and harassments (App. A, pp. 13, 17, 18, 20); all of which has resulted in the immediate, great, irreparable, damage of petitioner's reputation as a physician, his professional pursuits as a lecturer and teacher, and has ruined his scientific research with an anti-

cancer drug known as Krebiozen (App. A, pp. 13, 14, 15, 16); has further resulted in irreparable harm to the public generally by depriving cancer victims of the benefits of the drug (App. A, pp. 15, 16, 17), in that over one thousand physicians collaborating with the petitioner (App. A, p. 6) have found the drug to be safe (App. A, pp. 8, 15) and to have favorable biological (App. A, pp. 6-9) and pain alleviating (App. A, p. 8) attributes; and

(2) To have the court appoint a commission of physicians to ascertain the efficacy of the drug, and enjoin the respondents from proceeding in the criminal case until the commission makes its findings (App. A, pp. 19, 20), in that the only way to determine the drug's efficaciousness, according to all recognized medical authority, is by testing it on cancer patients clinically (App. A, p. 13), which the Secretary arbitrarily refuses to do (App. A, pp. 11, 13, 14), but instead, together with respondents, continues to vilify the petitioner and the drug's attributes (App. A, pp. 11, 12, 14, 16). The central issue of the indictment, as admitted by the respondents' pleadings in the instant case (App. A, p. 38), and a memorandum filed by them in the criminal case, is the efficacy of the drug (App. A, pp. 10, 11). Because of the scientific complexities such proof prismatically encompasses (App. A, pp. 6-9, 18), neither the court nor the jury, nor even the testimony of expert witnesses, can determine the drug's efficacy with scientific certainty without clinical testing (App. A, p. 19). The failure to have a clinical test can only result in rulings, testimony and a verdict based on pure conjecture (App. A, pp. 12, 18); whereas, a stay of the criminal case for a clinical test would result in the truth of the central issue being ascertained with certainty (App. A, p. 18). To proceed in the criminal case without this truth, when it is so easily available, is to deny the petitioner "a fair

trial" and "due process of law", in violation of his rights under the Fifth and Sixth Amendments to the Constitution of the United States (App. A, p. 19).

The complaint was filed about six weeks prior to the criminal trial (App. A, p. 3) which is at the time of this writing still in progress, and it is reasonable to believe that it will continue for a long period. The instant case was assigned, through no fault of the petitioner, to a judge other than the judge to which the criminal case was assigned.

On March 17, 1965, the petitioner moved for the issuance of a preliminary injunction (App. A, pp. 2, 34), at which time respondents filed, in open court, their motion to dismiss (App. A, pp. 2, 38), and within eight (8) days thereafter all supporting memoranda were filed (App. A, p. 39).

Respondents' motion to dismiss states that the court lacks jurisdiction over the subject matter of the complaint and the persons of the respondents; that there is no venue in the court; and that the complaint does not state a claim against the respondents upon which relief can be granted (App. A, p. 38).

The motion to dismiss was allowed and the district court dismissed the action on the morning of March 31, 1965; and that afternoon the petitioner moved the Court below to hear the case as an emergency matter, and the motion was denied the same afternooon. (App. A, p. 50).

At the time the district court dismissed the action it filed a written opinion (App. A, pp. 41-50). It ignored the fact that respondents' pleadings in the instant case (App. A, p. 38) and their memorandum filed in the criminal case admitted that the central issue of the indictment was the efficacy of the drug Krebiozen (App. A, pp. 10-11), and any criminality of the petitioner was linked to the alleged ineffectual attributes of the drug (App. A, pp. 47-48). It

ignored the fact that the unconstitutional misconduct of the Secretary can be imputed to the respondents under the teachings of *Philadelphia Co.* v. *Stimson*, 223 U.S. 605 (1912), when the unconstitutional misconduct was an arbitrary abuse of power similar to such abuse found in *Joint Anti-Fascist Committee* v. *McGrath*, 341 U.S. 123 (1951) (App. A, p. 44). It ignored the injury suffered by the petitioner specifically and the public generally citing as authority therefor *Douglas* v. *Jeannette*, 319 U.S. 157 (1943) (App. A, p. 49), and relied heavily on the Seventh Circuit Court of Appeal's mandamus case of *Goldberg* v. *Hoffman*, 225 F.2d 463 (1955), (App. A, pp. 45, 46); the latter case dealing with separation of powers vested in the three branches of Government and the respondents' executive discretionary powers thereunder. In citing *Ex parte Young*, 209 U.S. 123, and *Douglas* v. *Jeannette*, 319 U.S. 157, it ignored the fact that these cases deal with the doctrine of comity and the arrogation of states' judicial rights (App. A, p. 44), whereas in the instant case different sovereignties and federal judicial districts are not involved (App. A, p. 4).

It ignored the fact that respondents' motion to dismiss (App. A, p. 38) restricted its inquiry to the limited question of whether the complaint, as a matter of law, stated a cause of action and instead considered evidentiary material presented in respondents' memorandum regarding an irrelevant case decided by another court in the same judicial district, entitled *Ivy* v. *Celebrezze*,* involving different

* Respondents resorted to the same tactics by appending a portion of the transcript of the *Ivy* v. *Celebrezze* case, taken out of context, to their brief in the Court below. This irrelevant transcript is submitted as an additional Appendix.

issues, and interpreted the issues of that case favorably to the respondents in a manner inferentially presupposing that respondents had pleaded *res judicata* in answer to the complaint (App. A, p. 43). It ignored the fact that there should be no distinction between an abuse of power resulting in infringement of Constitutional rights and an unconstitutional statute which proscribes the same rights (App. A, p. 44). Cf: *Larson* v. *Domestic and Foreign Commerce Corporation*, 337 U.S. 682, 689, 690 (1949). It ignored the fact that a clinical test, involving a grave public matter and comparatively easily conducted (App. A, pp. 13, 19), could determine the truth regarding the efficacy of Krebiozen which is the central issue of the criminal trial (App. A, pp. 10, 19); whereas, any other testimony would be conjectural (App. A, pp. 12, 18), and beyond the jury's comprehension (App. A, p. 19), and notwithstanding, stated that expert witnesses could bridge the gap between the known and unknown (App. A, p. 48). It ignored the fact that Congress conferred jurisdiction on the court *via* the permissive statute invoked herein (App. A, p. 3), and stated that a judge "who received a case first should be permitted to retain jurisdiction over that case without interference." (App. A, pp. 44, 48).

The Court below affirmed the district court's opinion, but narrowed the issues (App. B, pp. 1-5, *infra*); however, there are still important areas of differences upon questions which this Court has never decided, and which should be settled, and which are appropriately enumerated in the next section hereof.

## REASONS FOR GRANTING THE WRIT

The decision of the Court below in the instant case has decided three important questions of federal law which have not been, and should be, settled by this Court:

1. The United States Secretary of Health, Education and Welfare admittedly invaded petitioner's Constitutional rights under the First and Fifth Amendments (App. A, 11, 12, 18); these invasions are comparable to the unconstitutional invasions made by the Attorney General of the United States in *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123 (1951).

The United States cannot be sued without its consent, and this immunity from suit extends to federal officers acting within the scope of their duties as such. But, whenever a federal officer exceeds the limits of authority and invades the Constitutional rights of individuals, in so doing he no longer represents the United States and hence loses the protection of sovereign immunity to suit. The invasions in the instant case were first perpetrated by said Secretary branding the petitioner and his professional pursuits as a fraud without prior notice and without justification. The respondents, by leveling the same accusations and defamations, caused an indictment to be returned against the petitioner, the gist of which indictment repeats the same defamatory accusations (App. A, pp. 10, 11). The respondents, being the statutory designated attorneys for the Secretary and acting at his behest, are further perpetuating and promulgating the Secretary's misuse of executive prerogatives and abuse of statutory power; and, therefore, the respondents are tainted with the same misconduct as the Secretary, lose their sovereign immunity, and their executive discretion is vitiated. *Ex parte Young*,

209 U.S. 123, 159, 160 (1907). The instant case seeks neither to restrain the judge in the criminal case, nor the grand jury from exercising its functions, but does seek to enjoin the respondents from doing that which they have no legal right to do (App. A, pp. 18, 19).

The Court below stated that it would not impute the misconduct of the Secretary to the respondents so as to divest them of their discretion to prosecute and their sovereign immunity from this suit; and further stated that *Philadelphia* v. *Stimson*, 223 U.S. 605 (1912), upon which we rely, is "wholly inapposite" (App. B, p. 4, *infra*).

In the *Stimson* case, at pages 621, 622, this Court said that if the proper facts were shown, it would impute any misconduct by the Secretary of War in violation of the Fifth Amendment to the federal prosecutor and restrain the latter from proceeding with a threatened prosecution. It logically follows that if the Secretary of War's violations of the Fifth Amendment could be imputed to the prosecutor, the Secretary of Health, Education and Welfare's misconduct in violation of the First and Fifth Amendments should be imputed to the prosecutor in the instant case. We perceive no distinction between the prosecutor being an agent before or after the fact, or whether the Secretary is joined as a party defendant. It is succinctly clear that the prosecutor's duties, discretions, and sovereign immunities are the same under the *Stimson* case as in the instant case, especially in the common circumstances of both cases, that the prosecutors are charged with the threat of instituting a multiplicity of criminal and civil actions (App. A, pp. 13, 17, 18, 20).

It is respectfully submitted that this Court should decide whether First and Fifth Amendment violations by federal officials, such as the Secretary of Health, Educa-

tion and Welfare in the instant case, should be imputed to federal prosecutors so as to strip them of their official character, vitiate their discretion, and prohibit them as individuals without sovereign immunity from proceeding with a pending criminal prosecution when the latter perpetuates the said officials' unconstitutional misconduct?

2. In the instant case an injunction was sought against the respondents to enjoin them from prosecuting the petitioner in a pending criminal case in the same federal judicial district and division (App. A, p. 4). This complaint in equity was filed about six weeks prior to the trial and about five months after the return of the indictment (the trial has been in progress since May 4, 1965, and at the time of this writing is still in progress). Neither the Fourteenth Amendment is in issue, nor does the doctrine of comity between the Federal and State Governments apply involving the arrogation of States' judicial rights.

This Court in *Cline* v. *Frink Dairy Co.*, 274 U.S. 445, 453 (1927), held that under the Fourteenth Amendment, an injunction should issue against all future threatened prosecutions but should not issue, on the grounds of comity, against the pending case. In *Ex parte Young*, 209 U.S. 123, involving the Attorney General of Minnesota, this Court issued an injunction against threatened criminal prosecutions. In the opinion, at page 162, this Court said by way of dictum, that an injunction would not issue against a pending criminal case; but *Ex parte Young*, being a Fourteenth Amendment case, comity explains this dictum. *Cf. Cleary* v. *Bolger*, 371 U.S. 392 (1963).

In this regard attention is invited to *United States* v. *Wood*, 295 F.(2d) 772, 784 (5th Cir., 1961), wherein that Court stated that the primary reason that this Court in *Douglas* v. *Jeannette*, 319 U.S. 157 (1943), did not inter-

fere with the state criminal system in regard to the validity of a statute, was attributed to the doctrine of comity; and in the recent case of *Dombrowski* v. *Pfister*, 380 U.S. 479, 483-485 (1965), this Court in holding a state statute invalid, patently cognizant of the doctrine of comity, restrained a criminal prosecution wherein the accused could not adequately vindicate his constitutional rights in the defense of the state criminal proceeding.

In *Jacob Hoffman Brewing Co.* v. *M'Elligott*, 259 F. 321, 328 (D.C., S.D., N.Y., 1919) Judge Augustus M. Hand, in issuing an injunction restraining the United States Attorney from criminally prosecuting the accused for an alleged violation of a federal statute, concluded that where the prosecutor proceeds either under an unconstitutional statute or in abuse of his powers, he may be enjoined from prosecution if the prosecution would cause irreparable injury to plaintiff's business or property rights. On appeal to the Second Circuit (259 Fed. 525) that Court agreed with said proposition of law (page 527), but reversed on the grounds that the United States Attorney's misconstruction of a valid statute was not tantamount to an abuse of power.

The complaint in the instant case does not challenge the constitutional validity of any statute the indictment charges the petitioner with violating; but it is respectfully submitted that on fundamental constitutional principles there should be no difference between constitutional invasions under an unconstitutional federal statute (*Campbell* v. *Medalie*, 71 F.2d 671; 2nd Cir., 1934), or state statute (*Dombrowski* v. *Pfister*, 380 U.S. 479—1965), and constitutional invasions by a federal officer's abuse of power (*Larson* v. *Domestic and Foreign Commerce Corporation*, 337 U.S. 682, 689, 690 (1949); *Philadelphia* v. *Stimson*, 223

U.S. 605, 620), except of course the stay and the procedural aspects thereof (28 U.S.C. 2283, 2284). In each case the evil is the same, whether it involves property rights under the Fifth or Fourteenth Amendments or freedom of expression under the First Amendment.

It is respectfully submitted that this Court should decide whether the federal equity courts have the power to, and should, restrain federal prosecutors in federal criminal proceedings, to prevent First Amendment violations (whether involving unconstitutional statutes or abuse of power), regardless of whether a case is pending or not, in view of the fact that the doctrine of comity is not applicable, as in the Fourteenth Amendment type of cases?

3. The complaint in the instant case alleges that the criminal court and jury inherently lack the ability to cope with the basic factual issue involved in the petitioner's defense to the crux of the indictment: namely, that Krebiozen is a remarkably efficacious anti-cancer agent and not a "cancer fake" as alleged in the indictment (App. A, p. 19). The complaint further alleges that only a court of equity can intelligently resolve this issue; that this scientific issue can be decided by only a clinical test (which no federal agency had ever undertaken); that a criminal trial would make the jury's verdict on this issue pure conjecture; and that if the petitioner were forced to defend himself in the criminal case without a clinical test first being conducted by physicians appointed by the court of equity he would be deprived of "due process of law" and a "fair trial" under the Fifth and Sixth Amendments to the Constitution of the United States (App. A, pp. 18, 19).

The Court below decided that the complexity of this factual issue to be determined by the jury in the criminal case is not a constitutional basis for enjoining respondents from prosecuting petitioner pending the outcome of a

clinical test (App. B, p. 5, *infra*). This decision conflicts in principle with applicable decisions of this Court.

In *Ex parte Young*, 209 U.S. 123 (1907), the constitutional validity of a Minnnesota statute establishing rates for a common carrier depended upon the factual issue of whether these rates were reasonable or too low. This Court held that this factual issue was too complicated for intelligent comprehension by a jury, affirmed the issuance of a federal injunction restraining the attorney general of the State of Minnesota from proceeding with threatened criminal prosecutions of officers and agents of the carrier under said statute in the state court, and referred the matter to a federal master to make the factual determination. This Court held at pages 164, 165:

> "Such investigation it would be almost impossible to make before a jury, as such body could not intelligently pass upon the matter. . . . From all these considerations it is plain that this is not a proper suit for investigation by a jury. Suits for penalties, or indictment or other criminal proceedings for a violation of the Act, would therefore furnish no reasonable or adequate opportunity for the presentation of a defense founded upon the assertion that the rates were too low and therefore the Act invalid.
>
> "We do not say the Company could not interpose this defense in an action to recover penalties or upon the trial of an indictment (*St. Louis & S. F. R. Co.* v. *Gill*, 156 U.S. 649, 39 L. ed. 567, 15 Sup. Ct. Rep. 484), but the facility of proving it in either case falls so far below that which would obtain in a court of equity that comparison is scarcely possible."

Likewise the recent case of *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965), emphasizes that a federal court of equity will restrain a state court prosecution where the accused is unable to adequately vindicate his First Amendment rights in the criminal case. As in *Dombrowski*, the petitioner in the instant case is being subjected to a continuing defamation of his reputation and medical pursuits in vio-

lation of his rights under the First and Fifth Amendments which cannot be adequately vindicated in the criminal case regardless of its outcome.

It is respectfully submitted that the Court below erred in concluding:

> "that the rationale of *Douglas* v. *City of Jeannette*, 319 U.S. 157, is applicable here, and in the language of *Dombrowski* (p. 485) there are 'no special circumstances to warrant cutting short the normal adjudication of constitutional defenses in the course of a criminal prosecution' ". (App. B, p. 5, *infra*).

We respectfully submit that the special circumstances required by *Dombrowski* to warrant an injunction against a criminal prosecution are overwhelmingly present in the instant case, not only for the reasons stated above, but also because of the magnitude of the public concern involved. If the clinical test is not ordered there will be irreparable injury to every person afflicted with cancer who is now being deprived of the drug. This is a perfect example of a case where, if the injunction does not issue, there will be irreparable public harm.

Modern scientific discoveries have caused legal dilemma impossible to resolve without complex, scientific inquiries. The lack of flexible powers of the criminal courts, and the juries thereof, prevents them from deciding these inquiries with scientific methods.

Jury verdicts may be conjectural where they rely upon conflicting expert testimony. When there is no better method resort must be had to expert testimony only. Common sense dictates that where a conflict of expert testimony exists regarding such issues, as in the instant case, and a court of equity can resolve this issue with absolute certainty by ordering a scientific test under the court's supervision, the court should so act. *In the absence of such action by the court, an accused would be deprived of*

*his right to properly defend himself.* There can be only one truth pertaining to any particular scientific fact.

In the instant case, respondents claim, relying upon expert witnesses that Krebiozen is ineffectual; whereas, petitioner relying upon clinical testing and expert witnesses avers that the drug is efficacious. In the circumstances, neither the criminal court nor the jury can ascertain with scientific certainty the truth. Only a court of equity by actually ordering the clinical testing of the drug on patients by physicians responsible to the court can do so.

Because *Dombrowski* and *Ex parte Young* did not involve any scientific issues to be decided by a criminal jury, as in the instant case, the Court below decided an important question of federal law which has not been, but should be, settled by this Court: Where the defense of an accused in a criminal case depends upon the truth of a scientific fact which can be determined only by a clinical test, conveniently and comparatively easily conducted by a court of equity, are the accused's rights under the Fifth and Sixth Amendments violated by forcing him to defend in the criminal case where conflicting testimony of experts can only result in a purely conjectural verdict?

## CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated at Chicago, Illinois, November 4, 1965

## APPENDIX B

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

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SEPTEMBER TERM, 1965—SEPTEMBER SESSION, 1965

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DR. ANDREW C. IVY,
*Plaintiff-Appellant,*

No. 15094 v.

NICHOLAS KATZENBACH, Attorney General of the United States, and EDWARD V. HANRAHAN, United States Attorney for the Northern District of Illinois,
*Defendants-Appellees.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

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September 22, 1965

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Before CASTLE, KILEY, and SWYGERT, *Circuit Judges.*

CASTLE, *Circuit Judge.* The plaintiff-appellant, Dr. Andrew C. Ivy, brought suit in the District Court against Nicholas Katzenbach, Attorney General of the United States, and Edward V. Hanrahan, United States Attorney for the Northern District of Illinois, the defendants-appellees, seeking to enjoin them from proceeding against him in a pending criminal cause and for the appointment of an impartial medical commission to make a court super-

vised clinical test of the efficacy of the drug Krebiozen in the treatment of cancer. Plaintiff's complaint was filed subsequent to the return of the indictment, but prior to the commencement of the criminal trial.[1] Defendants' motion to dismiss on the ground that the complaint does not state a claim on which relief can be granted was allowed and the action was dismissed. Plaintiff appealed.

The prosecution sought to be restrained involves an indictment charging Dr. Ivy, together with three individual and one corporate co-defendants, with conspiracy in violation of 18 U.S.C.A. §371. Dr. Ivy is named in additional substantive counts, alleged to be overt acts in furtherance of the conspiracy, which charge violations of 18 U.S.C.A. §1001 (filing false information with agencies of the government), violations of 18 U.S.C.A. §1341 (use of the mails in furtherance of a scheme to defraud), and violations of the Federal Food, Drug, and Cosmetic Act (21 U.S.C.A. §301 *et seq.*).

Plaintiff's complaint alleges in substance that plaintiff is a medical scientist of outstanding reputation who has been engaged, since approximately 1950, in experimental studies on the drug Krebiozen; his study and the reports of physicians submitted to him have demonstrated to his satisfaction that Krebiozen has produced favorable results as an anti-cancer agent and is useful in alleviating the pain usually present in terminal cases; plaintiff, as scientific adviser to the Krebiozen Research Foundation, has never received any remuneration for his advice, and has never submitted any applications to the United States with the object of becoming a sponsor or manufacturer of the drug; he has a mandate from the Illinois legislature to

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[1] At the time of the preparation of this opinion the criminal trial was still in progress.

conduct research and investigation on Krebiozen; the gist of the indictment against him is that Krebiozen is a fake cancer drug; the indictment is based upon reports of the National Cancer Institute and the Food and Drug Administration which are erroneous; the only way to prove whether Krebiozen is an effective treatment for cancer is by clinical test which no Federal agency has undertaken; the Secretary of Health, Education, and Welfare by persisting in the view that Krebiozen is a fake, by refusing to acknowledge that there is a difference of opinion about the drug's merits, and by refusing to conduct a clinical test, has caused the dissemination of adverse publicity and is acting arbitrarily and far beyond the exercise of administrative prerogative, and has, through his agents, discouraged physicians from prescribing Krebiozen by implied threats of reprisal by medical associations or the government, and has attempted to discourage patients from using the drug; this conduct of the Secretary has caused Ivy to lose prestige as a professional man, and his rights to practice medicine, to conduct research, and to teach and advocate ideas have been infringed; plaintiff has a legal and moral right to use any drug he regards as safe in treating cancer patients and is compelled to continue to use Krebiozen, which can only result in a multiplicity of civil and criminal actions; only a court of equity, and not a jury, can intelligently determine whether Krebiozen is a fake cancer drug and this determination can only be made after a court supervised clinical test; and that to require plaintiff to defend himself in the criminal trial without a prior clinical test of the drug will deprive him of due process of law. The complaint asserts that the acts complained of violate rights guaranteed to the plaintiff by the 1st, 5th and 6th Amendments to the Constitution of the United States.

The complaint does not challenge the constitutional validity of any of the statutes the indictment charges the plaintiff with violating nor is any allegation made that either of the defendants sought to be restrained is acting other than within the discretionary scope of his duties concerning enforcement of the laws. Apart from the question of the sufficiency of any of the factual allegations made with respect to the actions and conduct of the Secretary of Health, Education, and Welfare to present an issue involving the infringement of any constitutional right of the plaintiff, we perceive no basis either from the averments of the complaint or the applicable law for imputing to the defendants the alleged conduct of the Secretary. And plaintiff's reliance upon *Philadelphia Co. v. Stimson*, 223 U.S. 605 as a controlling precedent for the making of such imputation is wholly inapposite.

We are unpersuaded by the plaintiff's contention that a trial prior to an impartial clinical test of the efficacy of Krebiozen in the treatment of cancer would violate his 5th and 6th Amendment rights to a "fair trial" and "due process of law" for the reason that resolution of the efficacy issue presented by some of the counts of the indictment involves matter beyond the intelligence and comprehension of a jury and the complaint thus presents a basis for the injunctive relief sought. In this connection the memorandum opinion filed by the district judge discerningly and aptly points out:

> "Plaintiff's constitutional rights to a fair trial will be protected by the court in the criminal trial. Juries are called every day to determine problems which are not within the scope of their prior knowledge and experience; in these cases, the expert witness is used to bridge the gap between the known and the unknown. Expert witnesses in criminal trials are commonplace;

> the mere fact that the issues of a case may be complex or confusing to a jury does not mean that they must remain so—the prosecution must clarify the facts in order to present its charges properly. The complexity of the subject matter of a lawsuit cannot be raised to a constitutional issue in advance of its presentation in that lawsuit."

Mere complexity of factual issues to be determined by the jury in a criminal case is not a constitutional basis for precluding the trial.

We agree with the District Court that, contrary to the contentions of the plaintiff, the allegations of the complaint do not present one of those rare instances where considerations like those found in cases such as *Dombrowski* v. *Pfister*, 380 U.S. 479, and *Ex parte Young*, 209 U.S. 123, require that equity should intervene to restrain a pending criminal prosecution. We conclude that the rationale of *Douglas* v. *City of Jeannette*, 319 U.S. 157, is applicable here, and in the language of *Dombrowski* (p. 485) there are "no special circumstances to warrant cutting short the normal adjudication of constitutional defenses in the course of a criminal prosecution".

The judgment order appealed from is affirmed.

*Affirmed.*

A true Copy:
Teste:

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*Clerk of the United States Court of Appeals for the Seventh Circuit.*

## APPENDIX C

## TEXT OF PERTINENT AMENDMENTS TO THE CONSTITUTION

### AMENDMENT [I]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

### AMENDMENT [V]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

### AMENDMENT [VI]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

## APPENDIX D

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60610

Wednesday, September 22, 1965

Before

HON. LATHAM CASTLE, Circuit Judge
HON. ROGER J. KILEY, Circuit Judge
HON. LUTHER M. SWYGERT, Circuit Judge

No. 15094

DR. ANDREW C. IVY, *Plaintiff-Appellant,*
v.
NICHOLAS KATZENBACH, Attorney General of the United States, and EDWARD V. HANRAHAN, United States Attorney for the Northern District of Illinois, *Defendants-Appellees.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment order of the said District Court in this cause appealed from be, and the same is hereby, *affirmed,* in accordance with the opinion of this Court filed this day.

IN THE

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60610

I, KENNETH J. CARRICK, Clerk of the United States Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing pages contain a true copy of

1. The opinion of this Court, filed on September 22, 1965.
2. The judgment of this Court, entered on September 22, 1965.

Cause No. 15094

DR. ANDREW C. IVY, *Plaintiff-Appellant*

vs.

NICHOLAS KATZENBACH, Attorney General of the U. S. and EDWARD V. HANRAHAN, U. S. Attorney for the Northern District of Illinois, *Defendants-Appellees*

as the same remains upon the files and records of the United States Court of Appeals for the Seventh Circuit.

IN TESTIMONY WHEREOF I hereunto subscribe my name and affix the seal of said United States Court of Appeals for the Seventh Circuit, at the City of Chicago, this twenty-ninth day of October, A.D. 1965.

[SEAL]

*Kenneth J. Carrick*
Clerk of the United States Court of Appeals for the Seventh Circuit
By: Thomas F. Strubbe,
Deputy Clerk

# In the Supreme Court of the United States

OCTOBER TERM, 1965

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No. 727

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DR. ANDREW C. IVY, PETITIONER

*v.*

NICHOLAS KATZENBACH, ATTORNEY GENERAL OF THE UNITED STATES and EDWARD V. HANRAHAN, UNITED STATES ATTORNEY FOR THE NORTHERN DISTRICT OF ILLINOIS

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

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## BRIEF FOR THE RESPONDENTS IN OPPOSITION

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### OPINIONS BELOW

The opinion of the court of appeals (App. B 1-5) is not yet reported. The opinion of the district court (App. A 41-49)[1] is not reported.

[1] "App. A" refers to petitioner's appendix filed in the court of appeals. "App. B" refers to the opinion of the court of

## JURISDICTION

The judgment of the court of appeals was entered on September 22, 1965. The petition for a writ of certiorari was filed on November 5, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

## QUESTION PRESENTED

Whether petitioner's action to enjoin a criminal prosecution (now in the midst of trial) was properly dismissed.

## STATEMENT

On March 31, 1965, the United States District Court for the Northern District of Illinois dismissed a complaint which asked that the Attorney General and the United States Attorney be ordered to discontinue the criminal prosecution of petitioner until after an equity court had conducted a clinical test of Krebiozen, an alleged cure for cancer which is involved in the criminal case (App. A 41-50). The action was brought after indictment but before trial. The trial was not stayed and is currently proceeding, with the government having already rested its case. The district court's dismissal of the complaint was affirmed by the court of appeals.

The indictment against petitioner, three other individuals, and a corporation charges the giving of false

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appeals filed with this petition. "Ex. A" refers to the criminal indictment which is on file with the Clerk of this Court. "G. App." refers to the government's appendix filed below.

information to an agency of the United States (18 U.S.C. 1001), using the mails to defraud (18 U.S.C. 1341), violations of the Federal Food, Drug, and Cosmetic Act and conspiracy to commit these offenses (Ex. A). Petitioner is named in 43 substantive counts (counts 4-41, 45-49) and the conspiracy count (count 1) (Ex. A 1-6, 11-72, 79-85). The indictment charges, *inter alia*, that false information was given to the Food and Drug Administration regarding case histories,[2] that the drug was mislabelled as to cost of production,[3] and that the drug was transported interstate without complying with the regulations of the Secretary of Health, Education and Welfare with respect to new drugs.[4]

Before bringing the present action, petitioner had sought, in December 1964, to enjoin the Secretary of Health, Education and Welfare and others from enforcing the new drug provisions of the Federal Food,

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[2] Count 4 (Ex. A p. 11-13) is an example of such a charge. The count alleges that petitioner stated that a cancer patient died on October 15, 1953 when in fact she died on November 18, 1956. Other false statements as to treatment with Krebiozen are charged in other counts (*e.g.*, counts 5, 6).

[3] Cost of production was stated to be $9.50 per ampule. The indictment (count 8, *e.g.*) charges that the cost, using petitioner's method, is less than 25¢ per ampule. The brochures stated that the drugs were sold for cost and were to be used solely for investigation.

[4] *E.g.*, count 7, which is typical, charges an interstate shipment without approval of an application for a new drug. It alleges the shipment of the drug to a doctor for a patient with both lungs removed (a condition resulting in almost immediate death) who thus could not be used for investigation of the drug.

Drug and Cosmetic Act (21 U.S.C. 331(a)(d)(f), 333(b), 352(a) and 355(a) & (i)) in relation to him and Krebiozen, alleging that they were unconstitutional as applied. This complaint was dismissed on December 11, 1964 on the ground, *inter alia*, that the Secretary's ban on further shipment of Krebiozen was not unconstitutionally discriminatory since petitioner had failed to file the requisite notice and had failed to follow the procedure proscribed for experimental use (see *Ivy* v. *Celebrezze et al.*, G. App. 1-21). No appeal was taken.

Petitioner, in the instant case, alleged that the "unconstitutional" act of the Secretary must be imputed to the respondents since they are designated as his attorneys by statute. He asserted that the only way he can obtain a fair trial of the criminal case is to have an equity court itself conduct a clinical test of the effectiveness of Krebiozen since the issues are too complex for a jury (Pet. 15-16).

## ARGUMENT

Petitioner is attempting to halt a criminal trial in order to have one issue—the effectiveness of Krebiozen—tested by an equity court. The lower courts have applied the settled rule that "a court of equity will rarely enjoin criminal prosecutions which might be brought in the future and will almost never enjoin a pending criminal prosecution" (App. A 43-44). See *Douglas* v. *Jeannette*, 319 U.S. 157; *Cleary* v. *Bolger*, 371 U.S. 392, 397. This Court has stated that the "maxim that equity will not enjoin a criminal prosecu-

tion summarizes centuries of weighty experience in Anglo-American law." *Stefanelli* v. *Minard*, 342 U.S. 117, 120. The principle has often been applied to attempted restraints of federal prosecutions, contrary to petitioner's suggestion that it rests solely on considerations of comity (Pet. 13). See, *e.g.*, *Steiner* v. *Hocke*, 272 F. 2d 384 (C.A. 9); *Campbell* v. *Medalie*, 71 F. 2d 671 (C.A. 2), certiorari denied, 293 U.S. 592.

To be sure, in rare instances special circumstances may warrant a departure. See *Dombrowski* v. *Pfister*, 380 U.S. 479 in which the enforcement of a State's subversive control act was enjoined because the statute was unconstitutional on its face and its enforcement would have a chilling effect on First Amendment rights. In the instant case there are no remotely comparable circumstances. Petitioner acknowledges that he is not challenging the constitutionality of the statutes upon which the indictment is founded (Pet. 14). Rather, he claims that the Secretary of Health, Education and Welfare exceeded the constitutional limits of his power and that this abuse is imputed to the respondents. This argument is specious. An injunctive action alleging unconstitutional acts of the Secretary of Health, Education and Welfare was dismissed for failure to state a claim upon which relief could be granted. *Ivy* v. *Celebrezze et al.* (G. App. 1-21).[*] There was no appeal. Moreover, the actions of

[*] Since the only alleged unconstitutional actions are those of the Secretary of Health, Education and Welfare, who does not control the prosecution, this is an action against federal officials in the performance of their official acts. It is thus an action against the United States without its consent.

respondents in prosecuting petitioner are discretionary acts which are not controlled by the Secretary of Health, Education and Welfare. 28 U.S.C. 507. See *Ewing* v. *Mytinger & Casselberry, Inc.*, 339 U.S. 594, 599.

Even if Krebiozen could be proved effective by the extraordinary method suggested by petitioner, there would be no reason to enjoin the criminal case. Many of the counts charge the distribution of Krebiozen without an approved new-drug application. Others charge mislabeling and misrepresentation as to the cost of production. Still other counts allege that false information was given to the Food and Drug Administration in regard to case histories. A clinical test of Krebiozen would have no bearing on these counts and could provide no justification for the acts charged.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
*Solicitor General.*

FRED M. VINSON, JR.,
*Assistant Attorney General.*

BEATRICE ROSENBERG,
DONALD I. BIERMAN,
*Attorneys.*

NOVEMBER 1965.

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